

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARMANDO V. MUNOZ,

Plaintiff,

vs.

JAMES TILTON, et al.,

Defendants.

No. C 07-3846 JF (PR)

ORDER OF SERVICE;
DIRECTING DEFENDANTS
TO FILE DISPOSITIVE
MOTION OR NOTICE
REGARDING SUCH MOTION

Plaintiff, a California prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983 against California state prison officials. Plaintiff has been granted leave to proceed in forma pauperis in a separate written order. The Court will order service of the complaint on the named Defendants.

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be

1 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
2 1988).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
4 elements: (1) that a right secured by the Constitution or laws of the United States was
5 violated, and (2) that the alleged violation was committed by a person acting under the
6 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

7 Having reviewed the complaint, the Court finds that Plaintiff's allegations,
8 liberally construed, state a cognizable claim that the named Defendants violated his First
9 Amendment right to the free exercise of religion by restricting his possession of religious
10 materials in prison..

11 CONCLUSION

12 For the reasons stated above, the Court orders as follows:

13 1. The Clerk of the Court shall issue summons and the United States Marshal
14 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
15 attachments thereto, and a copy of this order upon **Director James Tilton, Jeanne**
16 **Woodford, Deputy Director Suzan Hubbard and N. Grannis, Chief of Inmate**
17 **Appeals, at the California Department of Corrections and Rehabilitation in**
18 **Sacramento, California; Warden Anthony P. Kane, Warden Ben Curry, Associate**
19 **Warden W.J. Hill, and Business Manager B. Hedrick at the Correctional Training**
20 **Facility in Soledad, California.** The Clerk shall also mail courtesy copies of the
21 complaint and this order to the California Attorney General's Office.

22 2. No later than **ninety (90) days** from the date of this order, Defendants shall
23 file a motion for summary judgment or other dispositive motion with respect to the claim
24 in the complaint as set forth above.

25 a. If Defendants elect to file a motion to dismiss on the grounds that
26 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
27 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
28 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.

1 Terhune, 540 U.S. 810 (2003).

2 b. Any motion for summary judgment shall be supported by adequate
3 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
4 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
5 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**
6 **the opinion that this case cannot be resolved by summary judgment, he shall so**
7 **inform the Court prior to the date the summary judgment motion is due.**

8 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
9 and served on Defendants no later than **thirty (30) days** from the date Defendants'
10 motion is filed.

11 a. In the event Defendants file an unenumerated motion to dismiss
12 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

13 The Defendants have made a motion to dismiss pursuant to Rule
14 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
15 exhausted your administrative remedies. The motion will, if granted, result
16 in the dismissal of your case. When a party you are suing makes a motion
17 to dismiss for failure to exhaust, and that motion is properly supported by
18 declarations (or other sworn testimony) and/or documents, you may not
19 simply rely on what your complaint says. Instead, you must set out specific
20 facts in declarations, depositions, answers to interrogatories, or documents,
21 that contradict the facts shown in the Defendant's declarations and
22 documents and show that you have in fact exhausted your claims. If you do
23 not submit your own evidence in opposition, the motion to dismiss, if
24 appropriate, may be granted and the case dismissed.

25 b. In the event Defendants file a motion for summary judgment, the
26 Ninth Circuit has held that the following notice should be given to Plaintiffs:

27 The defendants have made a motion for summary judgment by
28 which they seek to have your case dismissed. A motion for summary
judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for
summary judgment. Generally, summary judgment must be granted when
there is no genuine issue of material fact--that is, if there is no real dispute

¹The following notice is adapted from the summary judgment notice to be given to pro se
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 about any fact that would affect the result of your case, the party who asked
2 for summary judgment is entitled to judgment as a matter of law, which will
3 end your case. When a party you are suing makes a motion for summary
4 judgment that is properly supported by declarations (or other sworn
5 testimony), you cannot simply rely on what your complaint says. Instead,
6 you must set out specific facts in declarations, depositions, answers to
7 interrogatories, or authenticated documents, as provided in Rule 56(e), that
contradict the facts shown in the defendants' declarations and documents
and show that there is a genuine issue of material fact for trial. If you do
not submit your own evidence in opposition, summary judgment, if
appropriate, may be entered against you. If summary judgment is granted
in favor of defendants, your case will be dismissed and there will be no
trial.

8 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
9 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
10 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
11 evidence showing triable issues of material fact on every essential element of his claim).
12 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
13 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
14 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
15 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

16 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
17 Plaintiff's opposition is filed.

18 5. The motion shall be deemed submitted as of the date the reply brief is due.
19 No hearing will be held on the motion unless the Court so orders at a later date.

20 6. All communications by the Plaintiff with the Court must be served on
21 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
22 copy of the document to Defendants or Defendants' counsel.

23 7. Discovery may be taken in accordance with the Federal Rules of Civil
24 Procedure. No further Court order is required before the parties may conduct discovery.

25 //

26 //

27 //

1 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
2 Court informed of any change of address and must comply with the Court's orders in a
3 timely fashion. Failure to do so may result in the dismissal of this action for failure to
4 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

5 IT IS SO ORDERED.

6 DATED: 2/22/08


JEREMY FOGEL
United States District Judge

1 A copy of this ruling was mailed to the following:

2 Armando V. Munoz
3 K-30296
4 Correctional Training Facility-North
5 P.O. Box 705
6 Soledad, CA 93960-0705
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28